NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR 08-563

	Opinion Delivered February 18, 2009
TYRONE SIMMONS, A/K/A MELCHIZDEK MUHAMMAD APPELLANT	APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT, [NO. CR-2007-472-5]
V.	HONORABLE JODI RAINES DENNIS, JUDGE
STATE OF ARKANSAS APPELLEE	REVERSED AND REMANDED

M. MICHAEL KINARD, Judge

Tyrone Simmons, who is also known as Melchizdek Muhammad, appeals from his convictions for robbery and theft of property ($2,500 or more). He was sentenced as a habitual offender to two consecutive terms of 360 months' imprisonment in the Arkansas Department of Correction, and he was fined $5,000. On appeal, Simmons argues that the circuit court erred by allowing him to represent himself at trial because he had not made a knowing and intelligent waiver of his right to counsel. We agree and reverse.

On August 13, 2007, the circuit court appointed the office of the public defender to represent appellant. The office of the public defender represented appellant in pretrial matters until March 12, 2008, the day before trial was set to begin. At a pretrial hearing on that date, appellant stated that he wanted to represent himself. In response to questioning by the court, appellant stated that he "went to the 10th grade" in school and had not obtained a GED. This exchange followed:

THE COURT: Okay. Do you understand that, although you have not been trained in the law or any of the Rules of Criminal Procedure, that you will be held to the same level of accountability during the trial if you attempt to represent yourself?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. Do you know what a motion in limine is?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. Would you explain that to me?

THE DEFENDANT: A motion in limine is when you file grounds or a motion to give the State a certain amount of time to carry on in a procedure.

THE COURT: What do you consider to be hearsay?

THE DEFENDANT: Hearsay is when you've got an A.R. rule – I think it's 804 – statement that's hearsay – anything that's irrelevant against the case is considered as, like, hearsay.

. . . .

THE COURT: Okay. I also want you to realize that juries usually get angry about people who represent themselves and feel like that they are not making good decisions. It's more likely than not they might hold that against you because of that. And, you know, you're being filed as a habitual offender, having four or more priors. And so if they find you guilty... you're looking at a possible 80-year sentence in the Arkansas Department of Correction. Do you realize that?

THE DEFENDANT: Yes, ma'am.

The record reflects that after a brief discussion of other matters the trial court presented, or at least intended to present, appellant with a document regarding waiving his right to counsel. As this document is not included in the record, we cannot consider it on appeal. However, the court stated:

Well, I'm going to need to present to you a document about waiving – that you understand that you have a right to an attorney, if you cannot afford your own

> attorney. And I've even appointed the office of the public defender. And as a matter of fact, I'm going to have the public defender be a standby attorney so that when you are trying to represent yourself and you are stuck as to how to proceed, you may seek their advice on the next step in order to prevail on whatever it is you are wanting to do so you can do it.

The court informed appellant that he would be required to "act in a respectable manner." The court went on to explain to appellant that she (the judge) would not be able to help appellant in any way during the trial, that her role was to "decide if the law is followed and to rule on issues of law," and that the jury would decide the facts.

The following day, before the trial began, the court gave appellant another opportunity to allow himself to be represented by counsel. Appellant declined and proceeded to represent himself at his jury trial.

The Sixth Amendment of the United States Constitution, made obligatory on the States by the Due Process Clause of the Fourteenth Amendment, guarantees an accused the right to have the assistance of counsel for his defense. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Article 2, section 10, of the Arkansas Constitution provides that an accused in a criminal prosecution has the right to be heard by himself and his counsel. *Barnes v. State*, 258 Ark. 565, 528 S.W.2d 370 (1975). Furthermore, no sentence involving loss of liberty can be imposed where there has been a denial of counsel. *Philaw v. State*, 288 Ark. 237, 704 S.W.2d 608 (1986). On the other hand, a criminal defendant has a right to represent himself at trial where his waiver of the right to counsel is knowingly and intelligently made. *Faretta v. California*, 422 U.S. 806 (1975). The United States Supreme Court has addressed the right of a criminal defendant to conduct his own defense as follows:

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'

Id. at 835 (internal citations omitted). In *Faretta*, the Court also concluded that a defendant's technical legal knowledge, as such, is not relevant to an assessment of his knowing exercise of the right to defend himself. *Id.* at 836.

A defendant may proceed pro se in a criminal case when: (1) the request to waive the right to counsel is unequivocal and timely asserted; (2) there has been a knowing and intelligent waiver of the right to counsel; and (3) the defendant has not engaged in conduct that would prevent the fair and orderly exposition of the issues. *Bledsoe v. State*, 337 Ark. 403, 406, 989 S.W.2d 510, 512 (1999) (citing *Mayo v. State,* 336 Ark. 275, 984 S.W.2d 801 (1999)). Our standard of review is whether the circuit court's finding that the waiver of rights was knowingly and intelligently made was clearly against the preponderance of the evidence. *Pierce v. State*, 362 Ark. 491, 497, 209 S.W.3d 364, 367 (2005).

Here, there is no question that appellant's request to waive his right to counsel was unequivocal. However, without citing any authority for his contention, appellant argues that his waiver was not timely because it occurred the day before trial. The constitutional right to counsel is a personal right and may be waived at the pretrial stage or at trial. *E.g.*, *Pierce v. State*, 362 Ark. 491, 504, 209 S.W.3d 364, 370 (2005). We hold that appellant's

request to waive his right to counsel was timely asserted, and the first prong of the test was met. The third prong of the test for proceeding pro se is also met, as appellant concedes. Therefore, the only issue remaining is whether appellant's waiver of his right to counsel was made knowingly and intelligently.

Determining whether an intelligent waiver of the right to counsel has been made depends in each case on the particular facts and circumstances, including the background, the experience, and the conduct of the accused. *Bledsoe v. State*, 337 Ark. 403, 407, 989 S.W.2d 510, 512 (1999). Every reasonable presumption must be indulged against the waiver of fundamental constitutional rights. *Id.* A specific warning of the dangers and disadvantages of self-representation, or a record showing that the defendant possessed such required knowledge from other sources, is required to establish the validity of a waiver. *Id.* The burden is upon the State to show that an accused voluntarily and intelligently waived his fundamental right to the assistance of counsel. *Pierce v. State*, 362 Ark. 491, 499, 209 S.W.3d 364, 369 (2005) (citing *Oliver v. State,* 323 Ark. 743, 918 S.W.2d 690 (1996)).

The "constitutional minimum" for determining whether a waiver was knowing and intelligent is that the accused be made sufficiently aware of his right to have counsel present *and of the possible consequences of a decision to forgo the aid of counsel. Hatfield v. State*, 346 Ark. 319, 326, 57 S.W.3d 696, 700-01 (2001) (emphasis added). In *Bledsoe v. State*, *supra*, our supreme court wrote:

> The record does not reflect that the trial court advised Mr. Bledsoe of the dangers and disadvantages of proceeding without an attorney. While Mr. Bledsoe was informed several times about the requirement that he follow the rules and

> procedures of court, he was given no explanation as to the consequences of failing to comply with those rules, such as the inability to secure the admission or exclusion of evidence, or the failure to preserve arguments for appeal. There was simply no discussion about the substantive risks of proceeding without counsel.

337 Ark. at 409, 989 S.W.2d at 513. *Bledsoe* makes clear that a waiver is not knowing and intelligent when it is not preceded by an explanation of the consequences of failing to comply with the rules. Similarly, in *Parker v. State*, 93 Ark. App. 472, 220 S.W.3d 238 (2005), this court reversed because the trial court "did not make an inquiry as to [the defendant's] understanding of the legal process, and it did not *specifically* warn [him] of the *substantive* risks of proceeding without counsel." *Id.* at 480, 220 S.W.3d at 246 (emphasis in original).[1]

While we recognize that the circuit court in this case made many of the proper inquiries and admonitions, no explanation was given to appellant of the consequences of failing to comply with the rules. Therefore, we find that appellant's waiver was involuntary and the circuit court's finding to the contrary is clearly against the preponderance of the evidence.

The presence of the public defender as standby counsel during the trial must also be addressed. The assistance of standby counsel can rise to a level where the defendant is deemed to have had counsel for his defense, thereby mooting any assertion of involuntary waiver. *Bledsoe v. State*, 337 Ark. 403, 410, 989 S.W.2d 510, 514 (1999). Whether such assistance rises to that level is a question that must be answered by looking at the totality

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[1]The concurrence by Judge Baker explained in some detail the specific warnings a trial court is required to give a criminal defendant seeking to waive his right to counsel.

of the circumstances. *Id.* In order to moot an assertion of involuntary waiver, the assistance must be substantial, such that counsel was effectively conducting a defense. *Id.*

In pretrial proceedings, appellant's standby counsel attempted to clarify with the court what her role in the proceedings would be. Counsel stated that unless appellant asked her "something specific," she would not "interfere with his case." Appellant handled the trial by himself. He conducted *voir dire*, made his opening statement, examined all witnesses, moved for a directed verdict, and made his closing argument. A much higher level of participation from standby counsel than occurred in this case has been held to be inadequate to render moot a claim of involuntary waiver. *See, e.g.*, *Bledsoe*, *supra*. It is clear from the record that the standby counsel was not conducting appellant's defense.

In accordance with supreme court precedent in *Bledsoe* and *Hatfield*, we have no choice but to reverse and remand this case for retrial.

Reversed and remanded.

VAUGHT, C.J., and GLADWIN, J., agree.